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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978
No. 78-751

J. M. YOUNG,
Petitioner,

v.

ETHYL CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR ETHYL CORPORATION IN OPPOSITION

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BRIEF FOR ETHYL CORPORATION IN OPPOSITION

Ethyl Corporation, Respondent, opposes the Petition for Writ of Certiorari of J. M. Young, Petitioner, as follows:

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals conflicts with the law of Arkansas.

2. Whether the decision of the Court of Appeals conflicts with a decision of another Court of Appeals on the same matter.

STATEMENT

This case, which involves only a question of Arkansas property law, has been the subject of two trials and two appeals. In his complaint Petitioner invoked the jurisdiction of the federal courts under the statute providing for

federal jurisdiction when there is diversity of citizenship between the parties. There are no federal questions involved. Petitioner has never challenged the determinations made by each of the trial courts and the two panels of the Court of Appeals that the resolution of the dispute is to be governed by the law of the State of Arkansas.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Court of Appeals correctly applied well established principles of Arkansas law in reversing the damage award of the trial court and remanding the case for a correct determination of Petitioner's damages under the law of that State.

2. The decision of the Court of Appeals does not conflict with any decision of any other Court of Appeals.

3. The decision of the Court of Appeals does not conflict with any decision of any state court.

ARGUMENT

I.

The Court of Appeals correctly applied well established principles of Arkansas law in reversing the damage award of the trial court and remanding the case for a correct determination of Petitioner's damages under the law of that State

The decisions of the lower courts in connection with each of the two prior trials and appeals make it abundantly clear that this is a case which involves a mineral trespass.*

* Brine, the substance removed from beneath Petitioner's land, is, by Arkansas statute, a mineral. *Ark. Stat. Ann.* § 52-201 (1971).

Contrary to Petitioner's baseless assertions, he has not been denied a recovery of damages. The Court below has straightforwardly held that Petitioner should be awarded damages based on findings of fact made by the trial court grounded upon clear and convincing evidence and the Arkansas law applicable to those facts.

A.

Respondent's Trespass was a Trespass "In Good Faith"

The pivotal issue of fact in connection with the measure of damages in any mineral trespass case is whether the trespass was one engaged in "in good faith" (innocent) or whether it was committed "in bad faith" (willful). The trial court here, on the basis of overwhelming evidence, found as a fact that Respondent's trespass was a trespass "in good faith".

Petitioner's blatantly misleading characterizations of the trial court's fact findings clearly demonstrate the futility of his position. Even in the face of unequivocal findings of fact to the contrary, he continues to urge, as he did in the Court of Appeals, that the trial court found that Respondent was a "bad faith" trespasser and that his damages should be based on such a finding.

The trial court's finding on the crucial fact issue concerning the nature of Respondent's trespass is, *in toto*, as follows:

> "In 1975 the Court of Appeals for the Eighth Circuit declared and it is the law of this case that Defendant's action was a trespass and that valuable minerals were taken. The trespass was an act done deliberately by very smart and able operators who intended to and skillfully did exactly what they deliberately planned to do, which was to remove brine bearing bromine and other valuable minerals from the Smackover formation under the lands belonging to J. M. Young.

> "At the same time we find that the motive of the defendant, Ethyl, was based on a sincere belief it had a legal right to do what it was doing.
>
> "Judge Harris's opinion reported in 382 F.Supp. 769 is enough alone to show conclusively that, in law, the trespass was in good faith.
>
> "In the case at bar we have also the written opinion of both Texas and Arkansas attorneys, well advised in such matters and completely able in the oil and gas legal business, who advised the defendant that its course of action was legal. The evidence heavily preponderates to a finding that the action of the defendant was 'in good faith'.
>
> "The Court specifically finds and holds in this case that the trespass of Ethyl was an 'in good faith' trespass as that term is used in describing trespass and remedies for trespass." (Petition, A-95)

A trespasser who acts on the basis of advice rendered by a competent attorney is a good faith trespasser. *Mason* v. *United States,* 260 U.S. 545 (1923); *Delta Drilling Co.* v. *Arnett,* 186 F.2d 481 (6th Cir. 1950), *cert. denied,* 340 U.S. 954 (1951); *Daly* v. *Smith,* 220 Cal. App. 2d 592, 33 Cal. Rptr. 920 (1963); *Swiss Oil Corp.* v. *Hupp,* 253 Ky. 552, 69 S.W.2d 1037 (1934); *Cooke* v. *Gulf Refining Co.,* 135 La. 609, 65 So. 758 (1914); *Robinson* v. *Gordon Oil Co.,* 266 Mich. 65, 253 N.W. 218 (1934); *Dilworth* v. *Fortier,* 405 P.2d 38 (Okla. 1964). Indeed, reliance on the advice of counsel is considered competent evidence of good faith even though the attorney may have an interest in the profits derived from the trespass. *Daly* v. *Smith, supra.* It is significant here that in the two of the above-cited decisions the advice of counsel was premised upon an unsettled legal question. *Dilworth* v. *Fortier, supra; Delta Drilling Co.* v. *Arnett, supra.*

The questions of whether a mineral trespass is "willful" (bath faith) or "innocent" (good faith) is an issue of fact to be determined by the trier thereof. *Mason* v. *United States,* 260 U.S. 545, 556 (1923); *Central Coal & Coke Co.* v. *Penny,* 173 F. 340 (8th Cir. 1909); *Daly* v. *Smith,* 220 Cal. App. 2d 592, 33 Cal. Rptr. 920, 924 (1963); *Zugar* v. *Crystal Springs Bleachery,* 71 Ga. App. 821, 32 S.E.2d 414, 416 (1944); *Bowman* v. *Hibbard,* 257 S.W.2d 550, 552 (Ky. 1952); *Sandlin* v. *Webb,* 240 S.W.2d 69, 70 (Ky. 1951); *Griffith* v. *Clark Manufacturing Co.,* 212 Ky. 498, 279 S.W. 971 (1926); *Elk Garden Big Vein Mining Co.* v. *Gerstell,* 100 W. Va. 472, 131 S.E. 152, 154 (1926); *Pan Coal Co.* v. *Garland Pocahontas Coal Co.,* 97 W. Va. 368, 125 S.E. 226, 233 (1924).

Rule 52(a), *Federal Rules of Civil Procedure,* the rule relating to findings by the court, specifically provides:

> ". . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses . . ."

Here the trial court, after hearing all of the testimony, had ample opportunity to judge the credibility of all of the witnesses. His finding that Respondent's trespass was a trespass "in good faith" was correctly upheld by the Court of Appeals.

B.
The Measure of Damage to be Applied Under Arkansas Law Must Be Determined on the Basis of the Value of Petitioner's Brine as it was when Originally in Place in the Ground

The law of Arkansas with respect to the measure of damages for good faith mineral trespasses has been settled

since 1925 when the Supreme Court, in *Ward* v. *Spadra Coal Co.*, 168 Ark. 853, 272 S.W. 353 (1925), held:

> "The measure of damages in an action for unlawfully extracting ore from the premises of another depends upon whether the invasion of the premises was through inadvertence, or honest mistake, or was willful. *If the trespass is the result of an honest mistake, the defendant is compelled to pay only the value of the ore as it was when originally in place in the ground.*" (272 S.W. at 354) (Emphasis added).

Other Arkansas state and federal courts have consistently followed this rule. *Central Coal & Coke Co.* v. *Penny*, 173 F. 340 (8th Cir. 1909) *National Lead Co.* v. *Magnet Cove Barium Corp.*, 231 F. Supp. 208 (W.D. Ark. 1964); *Arkansas Power & Light Co.* v. *Decker*, 179 Ark. 592, 17 S.W.2d 293 (Ark. 1929); *Jewel Coal & Mining Co.* v. *Watson*, 176 Ark. 108, 2 S.W.2d 58 (1928); *McGraw* v. *Berry*, 170 Ark. 426, 280 S.W. 383 (1926).

C.
Under Arkansas Law the Value of Petitioner's Brine in Place is the Royalty Value Thereof

The law of Arkansas with respect to the measure of the value of a mineral in place was established by the Supreme Court in *Ward* v. *Spadra Coal Co.*, 168 Ark. 853, 272 S.W. 353 (1925). There, the court, after concluding that the trespass involved was undertaken in good faith, announced the Arkansas rule that the measure of the in place value of a mineral mined as a result of such a trespass is the royalty value thereof, as follows:

> "... The evidence in the record tends to show that the royalty usually paid in that locality for mining coal where the machinery and equipment was not considered was 10 cents for slack coal, and 15 cents for hard coal. This evidence is not disputed and should have been taken by the chancellor in fixing the value of the coal taken." (272 S.W. at 355)

The rule announced by *Ward* was reaffirmed in *McGraw* v. *Berry*, 170 Ark. 426, 280 S.W. 383 (1926). In that case, after finding that the defendant was a good faith trespasser, the court held that the in place value of the mineral taken was the royalty value thereof.

In a more recent decision, *Dinwiddie Construction Co.* v. *Campbell*, 81 Nev. 469, 406 P.2d 294, 297 (1965), the Nevada Supreme Court recognized that Arkansas is one of the jurisdictions which adheres to the royalty value test for awarding damages in cases involving good faith mineral trespasses.

National Lead Co. v. *Magnet Cove Barium Corp.*, 231 F. Supp. 208 (W.D. Ark. 1964), succinctly summarizes the Arkansas law with respect to damages to be awarded in cases involving good faith mineral trespasses. There the court recognized the long settled law of that state as it applies to the measure of damages to be assessed against a good faith mineral trespasser, as follows:

> "The court is also of the opinion that the proper measure of damages is *under the Arkansas law* the in-place value for the ore removed and disturbed because of an innocent or non-wilful trespass.... *As to a landowner who has not the opportunity nor the equipment to develop minerals, the amount for which he can lease them, or royalty value, is the generally accepted measure of damages as to him for an innocent trespass and conversion of minerals.*" (231 F.Supp. at 221) (Emphasis added).

In *National Lead* the party against whom the good faith trespass was committed was a corporate "mining lessee"

which had the know-how, opportunity and equipment to mine its minerals. In addition, the plaintiff there, unlike Petitioner here, owned a manufacturing facility in which to process the mineral involved. For those reasons alone did the court permit a recovery based on the enhanced value of the ore taken less the cost of the mining thereof. In that regard, the court said:

> "Thus, the court is of the opinion that the in-place value *as to a mining lessee, such as the plaintiff here,* is the enhanced value of the ore with a credit to a non-wilful trespasser for its costs. *By this approach the plaintiff mineral lessee is put in the place it would have been had it not been deprived of the opportunity of mining its ore,* while at the same time depriving the trespasser of any profit from its wrongdoing, but yet inflicting no punishment on the trespasser by the allowance of its expenses or costs in removing and developing the ore." (231 F.Supp. at 221) (Emphasis added).

Here the evidence is undisputed that Petitioner is not, and indeed could never be, a "mining lessee" within the meaning of the holding of the court in *National Lead.* He is an individual whose background is limited to farming. He has had no background or training in either the highly technical business of producing brine or the building of sophisticated chemical plants to convert that mineral into chemical compounds in a complicated manufacturing process. Petitioner's own testimony in this respect was conclusive. The testimony of his son-in-law is likewise decisive on this issue, as follows:

> "Q. How long have you known Mr. Young, Dr. Ziemer?
>
> "A. About ten years, and some few months.
>
> "Q. And you are his son-in-law, I believe the record has established?
>
> "A. Yes, sir.

> "Q. Based on your acquaintenance with Mr. Young, and being his son-in-law, do you know whether or not he has ever engaged in any occupation other than that of farming?
>
> "A. I believe just occupations related to farming, like cotton gin, or something like that.
>
> "Q. So far as you know has he ever been engaged in any manufacturing operations of any kind?
>
> "A. No, sir, not to my knowledge.
>
> "Q. Do you have any knowledge of whether or not he has any technical training or know-how which would permit him to feasibly build and operate a bromine extraction plant?
>
> "A. I don't think he has such training.
>
> "Q. Do you know whether or not he has any training or background or experience which would permit him to undertake his own venture whereby he would venture the extraction of brine from a reservoir for the production of bromine?
>
> "A. Not on his own I don't believe. He would not have all the necessary qualifications."

The uncontradicted evidence compels the conclusion of the Court of Appeals that under no circumstances could Petitioner have profitably developed the brine underlying his 169.1 acre tract. (Petition, A-4 and A-5).

On the basis of an abundance of evidence concerning sales of brine in south Arkansas, the trial court found that the value of the brine removed from beneath Petitioner's land as a result of Respondent's good faith trespass was two to five cents per barrel at the wellhead. (Petition, A-100). In addition, the record is replete with Arkansas brine leases, including one executed by Petitioner with respect to the very property made the subject of this litigation, which evidence the range of royalties historically paid for brine in that State. As was noted by the Court

of Appeals, Petitioner's brine lease provided for a royalty payment of 1/8 of the wellhead value of any brine which might be extracted from beneath his land (Petition, A-7).

The trial court also found the precise amount of the mineral that was displaced from beneath Petitioner's land. (Petition, A-97). The Court of Appeals correctly held that under the law of Arkansas Petitioner's damages should be based on the royalty value of the 7,612,000 barrels of the mineral, brine, that he lost as a result of Respondent's good faith trespass.

II.

The decision of the Court of Appeals does not conflict with any decision of any other Court of Appeals

Petitioner incorrectly asserts that the decision of the Court of Appeals is in conflict with the holdings of *Dow Chemical Co.* v. *Commissioner*, 433 F.2d 283 (6th Cir. 1970); *Pan American Petroleum Corp.* v. *Candelaria*, 403 F.2d 351 (10th Cir. 1968) and *Tidewater Oil Co.* v. *Jackson*, 320 F.2d 157 (10th Cir. 1963).

Dow Chemical Co. v. *Commissioner* involved an interpretation of highly technical and complex provisions of the Internal Revenue Code on a question of whether a chemical company in Michigan was permitted to take a depletion allowance for tax purposes on its income from several minerals extracted from brine. The *Dow* case does not deal in any form or fashion with the question of the measure of damage under Arkansas law which should be awarded to a landowner whose brine was taken from beneath his land as a result of a good faith trespass. The *Dow* Court held simply that under applicable provisions of the Internal Revenue Code the taxpayer's "gross income from mining", which was a statutory basis for depletion allowance, was

the gross sales value of the minerals extracted from brine. There is clearly no conflict in the decision of the court in *Dow* and that of the Court of Appeals here.

Pan American Petroleum Corp. v. *Candelaria* involved a dispute under New Mexico law. The suit was one to determine ownership of minerals. There is no question on this appeal concerning Petitioner's right to the ownership of the mineral involved here. The *Pan American* case did deal with a question of whether the plaintiff was entitled to recover damages under the law of New Mexico. The Court of Appeals held that he was. Here, however, the Court of Appeals was not concerned with whether Petitioner is entitled to recover damages under Arkansas law. There is no dispute in this case on that point. The only issue here is the *amount* of damages to which Petitioner is entitled. The Court of Appeals correctly held that the trial court did not follow Arkansas law in making its determination as to the amount of damage which Petitioner should recover.

Tidewater Oil Co. v. *Jackson* was a suit under Kansas law for the recovery of damages as a result of plaintiff's oil and gas wells having been physically damaged as a consequence of a negligently conducted water flooding operation by a neighboring landowner. One question on appeal was whether, under Kansas law, the plaintiff had a right to recover at all. After answering that question in the affirmative, the court simply held that under Kansas law the plaintiff was entitled to recover his lost profits which resulted from the physical damage to his oil and gas wells brought about by defendant's tortious activities.

It is readily apparent that Petitioner's claims of "conflict" are blatantly erroneous and that none of the decisions of the Court of Appeals which he cites conflict with the decision of the Court of Appeals in this case.

III.
The decision of the Court of Appeals does not conflict with any decision of any state court

Petitioner likewise erroneously contends that the decision of the Court of Appeals conflicts with the holdings of four decisions of the Supreme Court of Arkansas, *Burbridge* v. *Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951); *Burford* v. *Upton*, 232 Ark. 456, 338 S.W.2d 929 (1960); *Young* v. *City of Gurdon*, 169 Ark. 399, 275 S.W. 890 (1925); and *Roberts* v. *Williams*, 15 Ark. 43 (1854).

Burbridge v. *Bradley Lumber Co.* is a timber trespass case. It does not deal with a mineral trespass. It is clear that the *Burbridge* court limited its decision to cases involving timber trespasses and did not change or modify the long-standing law of Arkansas with respect to good faith mineral trespasses. The plain language of the court in this respect is as follows:

> "The Appellee, Bradley Lumber Co., cut, removed and converted to lumber some 500,000 feet of timber from lands belonging to Burbridge, under the honest but mistaken belief that the land belonged to the Lumber Company."
>
> * * *
>
> "Our cases have laid down two different rules regarding the measure of damages for the innocent conversion of timber."
>
> * * *
>
> "The case at bar presents the issue of which rule this court is now going to follow as the law of this State." (239 S.W.2d at 285, 286 and 288)

There the court held that the damages assessed against the defendant which in good faith converted timber into

cross ties should be based on the value of the cross ties less the cost of labor, material and incidental items necessarily expended in transforming it.

The reasoning of the *Burbridge* decision is not applicable in this mineral trespass case because:

1. Here the evidence is undisputed that Respondent could not have recovered brine from lands which it either owned or leased without taking brine from beneath the surface of Petitioner's land. In a timber case, on the other hand, one can obviously cut trees from his own land without crossing property lines and cutting trees from the land of another.

2. Here the evidence is uncontradicted that Petitioner could not have efficiently or economically mined the brine from beneath his 169.1 acre tract of land. His own witnesses unequivocally testified that it would have been an "uneconomic and foolhardy" venture for Petitioner to operate a well on the 169.1 acre tract in question for the production of bromine and that no prudent operator would have drilled a well on that tract to produce brine therefrom.

In a timber situation, however, such as the one presented in *Burbridge*, a landowner who decides to engage in the lumber business does not require a huge investment of the character required for brine producing and bromine extraction facilities to conduct an operation such as the one engaged in by Respondent in south Arkansas. Presumably, with as small an investment as a chain saw, and perhaps a pick-up truck, a landowner who chooses to do so can efficiently and profitably conduct a timber operation if he owns a sufficient quantity of timber land.

The Court of Appeals correctly distinguished the *Burbridge* case from the instant case on these bases.

Petitioner's claim that *Burford* v. *Upton, Young* v. *City of Gurdon* and *Roberts* v. *Williams* conflict with the decision of the Court of Appeals highlights the absurdity of each of his contentions that this Court should review the decision of the Court below.

Burford was a condemnation suit involving lands condemned by the City of Little Rock. *Young* and *Roberts* were also condemnation suits. In *Young* the sole question was whether a city had the authority to condemn plaintiff's land in order to create a drainage system for the city. In *Roberts* the issue was whether a county had condemned plaintiff's land to create a county road pursuant to proper procedural rules established by the state condemnation statute. In none of these cases was there an issue involving trespass or damages for trespass.

The decision of the Court of Appeals does not conflict with any decision of any Arkansas state court, or indeed, with any decision of any court of any other state. To the contrary, it follows to the letter the decisions of all states which have considered the question of damages to be awarded in mineral trespass cases. See, *e.g., Dinwiddie Construction Co.* v. *Campbell,* 81 Nev. 469, 406 P.2d 294 (1965). Petitioner's have not dealt fairly with this Court is asserting that the decision of the Court below conflicts with decisions of the courts of the State of Arkansas.

CONCLUSION

Petitioner's wild and outrageous claims that he has been discriminated against, that he has been denied due process of law and that he has been denied his day in court are patently absurd and should be rejected out of hand. Petitioner has not only had two trials and two appeals, but, based on the decision of the Court of Appeals, his damage

award on remand will not be insubstantial. While Respondent believes that under the Arkansas law of capture Petitioner should recover nothing at all, it has not contested here the 1975 decision of the Court of Appeals. Nevertheless, it is crystal clear that the Court of Appeals correctly applied the law of Arkansas with respect to the formulation of Petitioner's damages as a result of Respondent's good faith trespass as determined by the Court of Appeals in 1975 and the trial court in 1977.

For each of the reasons stated above the Petition for Writ of Certiorari herein should be denied.

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